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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, *i.e.*, gross receipts less expenses.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 282 F.3d 475.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2002. A petition for rehearing was denied on May 22, 2002 (App., *infra*, 8a-9a). On August 5, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, respondents were convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371; conducting an illegal gambling business, in violation of 18 U.S.C. 1955; conspiring to commit money laundering, in violation 18 U.S.C. 1956(h); money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); conspiring to commit tax fraud, in violation of 18 U.S.C. 371; and filing false tax returns, in violation of 26 U.S.C. 7206(1). 99 CR 296-1 Judgment 1 (N.D. Ill. filed Jan. 29, 2001) (Cechini Judg.); 99 CR 296-2 Judgment 1 (N.D. Ill. filed Jan. 29, 2001) (Scialabba Judg.).

Respondent Cechini was sentenced principally to 188 months of imprisonment, to be followed by three years of supervised release, and fined $40,000. Cechini Judg. 2, 4, 5. Respondent Scialabba was sentenced principally to 108 months of imprisonment, to be followed by three years of supervised release, and fined $17,500. Scialabba Judg. 2, 4, 5. The United States Court of Appeals for the Seventh Circuit vacated respondents' money laundering convictions and remanded to the district court for resentencing on the other convictions. App., *infra*, 1a-7a.

1. OK Amusement provided video poker and slot machines to bars, restaurants, bowling alleys, and other retail establishments in various towns in Illinois. Respondent Cechini was the sole proprietor of OK Amusement, and he hired respondent Scialabba to assist him. To play the machines, customers deposited money, and they received on-screen credits if they won. They could use the credits to continue playing, which was lawful, or they could redeem the credits for cash from the owners

of the retail outlets, which was not. Many outlet owners redeemed credits for cash. App., *infra*, 2a; Gov't C.A. Br. 2-3.

Each week, respondents opened the machines and collected any deposited money that the outlet owners had not already removed. From those deposits, respondents paid funds to the outlet owners based on a split of the difference between the "ins" (the amount of money deposited in the machines) and "outs" (the amount paid to winning customers). In addition, respondents used cash obtained from the machines to reimburse some owners for out-of-pocket payments made to winning customers. App., *infra*, 2a; Gov't C.A. Br. 4. OK Amusement and the outlet owners shared the cost of the state licenses authorizing operation of the machines for amusement (but not for gambling), and respondents used cash from the machines to pay those costs. App., *infra*, 3a; Gov't C.A. Br. 4-5. Respondents also used the gambling receipts to make weekly cash payments to lease the machines. App., *infra*, 3a; Gov't C.A. Br. 5-6.

2. The federal money laundering statute at issue here makes it a crime for anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] or attempt[] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part—

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1). In essence, subsection (A)(i) prohibits the use of the proceeds of the specified crimes to promote those crimes, and subsection (B)(i) prohibits the use of the proceeds to conceal the fact that they are the product of crime.

The money laundering statute defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering crimes enumerated in 18 U.S.C. 1961(1). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1).

Respondents were charged with violating the promotion subsection of the money laundering statute, Section 1956(a)(1)(A)(i), by using the receipts from their illegal gambling operations to pay the outlet owners, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See Indictment, Counts 4-15. After a jury trial, respondents were convicted of those (and other) charges. See Cechini Judg. 1; Scialabba Judg. 1.

3. The court of appeals reversed respondents' money laundering convictions. App., *infra*, 1a-7a. The government contended that respondents had violated Section 1956 by engaging in transactions—paying the outlet owners, leasing the gambling machines, and obtaining the amusement licenses necessary to operate the machines—with the funds removed from the gambling machines. The court of appeals characterized the government's theory as "equivalent to saying that every drug dealer commits money laundering by using

the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on." *Id.* at 3a. The court stated that "none of these transactions entails financial transactions to hide or invest profits in order to evade detection, the normal understanding of money laundering." *Ibid.* The court also said that respondents were not "charged with reinvestment in seemingly legitimate businesses or other means to whitewash (= 'launder') the funds; the focus was entirely on the disposition of the gross income." *Ibid.* Based on those observations, the court reasoned that "the money laundering convictions depend on the proposition that gross income is 'proceeds' under the statute." *Ibid.*

The court of appeals noted that "proceeds" is not defined in the statute, and it found that the statutory context does not indicate whether proceeds refers to gross receipts or net income. But the court thought that interpreting "proceeds" to mean gross receipts "could produce odd outcomes" in both the gambling and drug contexts. App., *infra*, 4a (questioning how "proceeds" would be defined if a slot machine paid out its winnings on the spot; asserting that the "proceeds" of drug dealing would be the net yield, rather than the gross receipts out of which inventory must be purchased). The court surmised that Congress would have said "receipts" rather than "proceeds" if it had meant to reach gross amounts received, and it found that the rule of lenity counseled against a gross-receipts interpretation. The court therefore read "proceeds" to mean "profits." *Id.* at 5a. Furthermore, the court expressed concern that defining "proceeds" to mean "gross receipts" would result in the merger of the underlying crime and the money laundering, so that the same

transactions that constituted illegal gambling would also necessarily constitute money laundering. *Id.* at 5a-6a. To avoid that result, the court concluded that "the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture." *Id.* at 7a. Applying that definition, the court vacated respondents' convictions for money laundering and remanded for resentencing on respondents' other convictions. *Ibid.*

The government petitioned for rehearing and rehearing en banc. Judge Williams recused herself, and the petition was denied by an equally divided court. Judges Posner, Ripple, Manion, Kanne, and Diane P. Wood voted to grant rehearing en banc. App., *infra*, 9a & nn.*-**.

REASONS FOR GRANTING THE PETITION

The court of appeals has interpreted the principal federal money laundering statute in a fashion that contradicts its text, departs from the approach taken by other circuits, and threatens to complicate if not frustrate altogether many conventional applications of the statute. By holding that the word "proceeds" means "profits" under 18 U.S.C. 1956(a)(1), the court of appeals has incorrectly rejected the common understanding of the term "proceeds," as well as the meaning that Congress has accorded the term in related statutes, including one enacted just two years before the money laundering statute. The court relied on reasoning that has broad implications for prosecutions, like the present one, that charge the defendants with engaging in financial transactions with the proceeds of specified crimes with the intent to *promote* those crimes. The court reasoned that, without financial transactions that "hide or invest profits in order to

evade detection," a prosecution departs from "the normal understanding of money laundering." App., *infra*, 3a. But Section 1956 contains separate subsections that explicitly prohibit transactions "with the intent to promote the carrying on of specified unlawful activity" (Section 1956(a)(1)(A)(i)) and transactions to "conceal" the source of the proceeds (Section 1956(a)(1)(B)(i)). The court of appeals' theory, if extended to its logical limits, would eviscerate the promotion aspect of the statute.

The decision below cannot be reconciled with the results reached and reasoning employed by other courts of appeals applying Section 1956. The decision will also impair enforcement of the congressional prohibition on money laundering by subjecting the government to an unreasonable burden of proof and enmeshing the courts in complicated issues concerning the accounting principles that should govern illegal enterprises. For those reasons, and because the question presented is recurring and important, the court of appeals' decision warrants review by this Court.

A. The Court Of Appeals' Decision Incorrectly Constricts The Scope And Impairs Enforcement Of The Money Laundering Statute

The money laundering statute, as relevant here, targets transactions in unlawfully derived "proceeds" when those transactions are intended to promote the underlying illegal activity. 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals would require the government to prove that the funds used in those transactions represent the "profits" of illegal activity. As the examples given by the court of appeals reveal, the court would thus have the government establish the profitability of illegal schemes, such as drug dealing and bank robbery,

in order to obtain a money laundering conviction. App., *infra*, 3a. Yet that approach would impose an unreasonable burden of proof on the government and entangle the courts in complicated interpretive questions. Unlike legitimate businesses, criminals rarely keep accounting records. Indeed, the Seventh Circuit itself has noted the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and rev'd in part, 432 U.S. 137 (1977). Even if documentation can be found, it is not clear what principles of accounting should be applied to the operations of such criminal enterprises; the accounting industry does not prescribe standards for illegal ventures. The upshot of the court of appeals' holding is to encumber the prosecution of ordinary money laundering cases with significant complications. If Congress had legislated a "profits" rule, then the government would have to shoulder that burden. But an examination of the statutory text and background reveals that Congress did no such thing.

1. The court of appeals' definition of "proceeds" as "net income" or "profits"—for which the court cites no authority—is contrary to the word's most common and "primary meaning." *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). The initial definitions of "proceeds" provided by the *Random House Dictionary of the English Language* (2d ed. 1987), which lists first the most frequently encountered meanings of a word, *id.* at xxxii, are "something that results or accrues" and "the *total* amount derived from a sale or other transaction." *Id.* at 1542 (emphasis added). The dictionary offers "profits" only as a secondary, less common definition. *Ibid.* Likewise, *Black's Law Dictionary* (7th ed. 1999) defines "proceeds" as "1. The value of land, goods, or

investments when converted into money; the amount of money received from a sale. 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral." *Black's Law Dictionary* distinguishes "proceeds" from "net proceeds," which, in a sub-entry under "proceeds," it defines as "[t]he amount received in a transaction minus the cost of the transaction (such as expenses and commissions)." *Ibid.* See *Webster's Third New International Dictionary* 1807 (1993) (*Webster's*) (providing, as the initial definition of "proceeds," "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue : the total amount brought in").

The "profits" definition adopted by the court of appeals also departs from the meaning that Congress accorded the word "proceeds" just two years before it enacted the money laundering statute, when Congress amended the Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute. The forfeiture provision, as amended, provides that a RICO offender must forfeit "any property constituting, or derived from, any *proceeds* which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. 1963(a)(3) (emphasis added). All but one of the courts of appeals that have addressed the issue have determined that the word "proceeds," as used in that provision, means gross receipts, not net profits. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).[1]

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[1] The Seventh Circuit is the lone exception. As with the money laundering statute, the Seventh Circuit has suggested (in dictum) that "proceeds" in the RICO forfeiture statute means net rather

The legislative history of the RICO forfeiture statute confirms that "proceeds" does not mean "profits."

> [T]he term "proceeds" has been used in lieu of the term "profits" in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were.

S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Indeed, the Senate Report on the RICO forfeiture provision specifically cited the Seventh Circuit's recognition in *United States* v. *Jeffers* that reliable evidence of "net profits" in criminal conspiracies is hard to adduce. *Id.* at 199 n.24. There is no reason to believe that Congress intended to deviate from its approach in the RICO statute when it enacted the money laundering statute shortly thereafter and used the same term, "proceeds." Rather, it is logical to conclude that Congress intended a consistent meaning for the term as used in the criminal law. See also *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996) (interpreting "proceeds" as used in 21 U.S.C. 853, the drug forfeiture statute, to mean gross receipts rather than net income), cert. denied, 520 U.S. 1281 (1997).

Further undercutting a "net income" or "profits" interpretation is that those phases have concrete meaning only after application of a system of accounting principles. But there is no source of generally accepted accounting principles for criminal enterprises. Therefore, application of a "profits" approach would require the courts to formulate an accounting theory for illegal businesses. The courts would have to resolve difficult

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than gross receipts. See *United States* v. *Masters*, 924 F.2d 1362, 1369-1370, cert. denied, 500 U.S. 919 (1991).

and novel questions, such as whether illicit profit should be measured using accrual or cash accounting methods; whether such profit should be measured on an annual, monthly or other basis; and what costs can legitimately be deducted to arrive at the profit figure (*e.g.*, can the operator of an illegal business deduct a "salary" to compensate himself for the time he devotes to the business?). Congress should not lightly be understood to have handed such a task to the courts, without any guidance or ready body of case law to consult.

2. The court of appeals reasoned that the "profits" or "net income" definition of proceeds is appropriate because it confines the statute's scope to what the court viewed as "the normal understanding of money laundering"—transactions designed "to whitewash (= 'launder') the funds" produced by crime "in order to evade detection." App., *infra*, 3a. The court's assumption that the statute prohibits only transactions designed to conceal illegal activity is fundamentally incorrect. Section 1956(a)(1), in relevant part, makes it unlawful for anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] or attempt[] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part—

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1). Only one of Section 1956(a)(1)'s subsections, Section 1956(a)(1)(B)(i), addresses financial transactions undertaken for the purpose of concealing a criminal's ill-gotten gains to evade detection. Another, independent subsection, Section 1956(a)(1)(A)(i), which is the provision at issue here, expressly prohibits transactions designed to promote unlawful activity regardless whether the perpetrator has any intent to conceal. The promotion subsection and the concealment subsection "are set forth in the disjunctive" and therefore "an intent to launder * * * is not a required element of [the promotion subsection] offense." *United States* v. *Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991). See *United States* v. *Carcione*, 272 F.3d 1297, 1302 n.8 (11th Cir. 2001); *United States* v. *Torres*, 53 F.3d 1129, 1139 n.7 (10th Cir. 1995), cert. denied, 519 U.S. 890 (1996); *United States* v. *Skinner*, 946 F.2d 176, 177-178 (2d Cir. 1991). Because Section 1956(a)(1)(A)(i) does not require an intent to conceal, the court of appeals erred in using that element as a guidepost for construing that subsection. In doing so, the court constricted the statute's scope in contravention of the congressional intent reflected in its plain language.

Indeed, under one reading of the court of appeals' opinion, the court has excluded from the scope of the money laundering statute not only transactions in which a criminal uses illicitly-derived funds to cover the expenses of the *particular* crime that generated the funds, but *all* transactions in which ill-gotten funds are *reinvested* into an ongoing criminal enterprise, even if

those transactions promote *continued or expanded* criminal activity. The court suggested, for example, that the statute would not apply to a drug trafficker who "us[es] the receipts from sales to purchase more stock in trade" or a bank robber who "us[es] part of the loot from one heist to rent a getaway car for the next." App., *infra*, 3a. That interpretation constitutes a dramatic curtailment of the scope of the statute as it has traditionally been understood. A large majority of prosecutions under the promotion subsection of the statute involve precisely those kinds of financial transactions, and such prosecutions are a staple of federal efforts to curtail organized crime, drug trafficking, and business fraud.[2]

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[2] See, *e.g.*, *United States* v. *Dovalina*, 262 F.3d 472, 476 (4th Cir. 2001) (evidence sufficient to support money laundering conviction because defendant "used cash proceeds from the sale of marijuana to promote additional marijuana sales"); *United States* v. *Stewart*, 256 F.3d 231, 250 (4th Cir. 2001) (evidence sufficient to support money laundering conviction because "a portion of the drug proceeds were reinvested into the drug operation"), cert. denied, 122 S. Ct. 1451 (2002); *United States* v. *Burgos*, 254 F.3d 8, 13 (1st Cir.) (money laundering conviction involving use of drug proceeds to buy additional drugs for distribution), cert. denied, 122 S. Ct. 497 (2001); *United States* v. *Taylor*, 239 F.3d 994, 998-999 (9th Cir. 2001) (evidence sufficient to support money laundering conviction because proceeds from prostitution used to transport minors across state lines for prostitution); *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir.) (evidence sufficient to support money laundering conviction because drug proceeds used "to facilitate the continuation of drug trafficking"), cert. denied, 528 U.S. 897 (1999); *United States* v. *Haun*, 90 F.3d 1096, 1100 (6th Cir. 1996) (evidence sufficient to support money laundering conviction where defendant deposited check representing proceeds of fraud to promote "ongoing and future unlawful activity"), cert. denied, 519 U.S. 1059 (1997); *United States* v. *Golb*, 69 F.3d 1417, 1424 (9th Cir. 1995) (evidence sufficient to support money laundering conviction

3. The court of appeals mistakenly believed that its interpretation of the word "proceeds" is necessary to maintain a distinction between the offense of money laundering and the underlying crime that produces the laundered proceeds. See App., *infra*, 1a-2a, 5a-6a. But the court's concern to maintain that distinction does not justify its unnatural and illogical constriction of the definition of "proceeds." Rather, as other opinions have recognized, the distinction between a money laundering transaction and the underlying crime is maintained by generally requiring that the charged transaction "must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Heaps*, 39 F.3d 479, 485-486 (4th Cir. 1994); *United States* v. *Conley*, 37 F.3d 970, 980 (3d Cir. 1994).

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because drug proceeds used "to facilitate * * * continued use of * * * planes for drug trafficking"), cert. denied, 517 U.S. 1127 (1996); *United States* v. *Thomas*, 12 F.3d 1350, 1360 (5th Cir.) (evidence sufficient to support money laundering conviction because drug proceeds used to pay for later drug purchases), cert. denied, 511 U.S. 1114 (1994); *United States* v. *Cruz*, 993 F.2d 164, 167 (8th Cir. 1993) (evidence sufficient to support money laundering conviction because drug proceeds used to buy vehicle that was then used to transport drugs); *United States* v. *Cole*, 988 F.2d 681, 682 (7th Cir. 1993) (money laundering charges based on use of proceeds of investment fraud to pay "interest" to defrauded investors when "necessary to keep the scheme going"); *United States* v. *Johnson*, 971 F.2d 562, 566 (10th Cir. 1992) (evidence sufficient to support money laundering conviction because proceeds of fraud used to pay off home mortgage and buy expensive car in order to impress prospective victims with defendant's business acumen); *United States* v. *Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (evidence sufficient to support money laundering conviction because drug proceeds used to buy beepers for use in continued drug operation).

For example, when a bank robber uses the loot from a robbery to pay his accomplices, the payments to the accomplices are distinct from the conduct constituting the robbery, so the separate-conduct requirement is satisfied. Likewise, the requirement is satisfied when a drug trafficker uses the proceeds from a drug sale to buy a stash house for his enterprise, because the house purchase and drug sale constitute distinct transactions. See *Conley*, 37 F.3d at 980 ("proceeds are derived from an already completed offense, or a completed phase of an ongoing offense"). On the other hand, the separate-conduct requirement would be violated in a case where "the payment for drugs itself [were] held to be a transaction that promoted the unlawful activity of that same transaction." *Heaps*, 39 F.3d at 485.

This case involves conduct similar to the accomplice payments and the stash house purchase: The payments to the outlet owners are akin to the accomplice payments because they compensate the defendants' partners in crime, and the lease and licensing payments are akin to the stash house purchase because they facilitate future illegal activity. Thus, the Seventh Circuit's cramped definition of proceeds is unnecessary to implement the requirement that the underlying criminal act and the money laundering conduct be distinct. Rather, it inappropriately excludes from the ambit of the money laundering statute conduct that goes beyond the underlying crime and entails use of the revenue produced by that crime to promote criminal activity—precisely what the promotion subsection of the statute is designed to prohibit.

B. The Decision Of The Court Of Appeals Departs From The Approach Of Other Courts Of Appeals

The decision of the court of appeals is not only incorrect but also departs from the construction that other courts of appeals have accorded the money laundering statute.

1. The definition of proceeds adopted by the Seventh Circuit conflicts with the definition used by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that was based on the contention that the word "proceeds" is unconstitutionally vague. The court of appeals held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Id.* at 1101 (emphasis added) (quoting *Webster's* 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the term "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 (2000). The Sixth Circuit's "total revenue" definition directly contradicts the "profits" or "net income" definition adopted by the Seventh Circuit in this case.[3]

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[3] As noted above, the Seventh Circuit's interpretation of "proceeds" is also at odds with the meaning that other courts of appeals have accorded the term in the related RICO forfeiture statute. Three courts of appeals have expressly held that "proceeds" as

2. In addition, the Third Circuit has, without conducting a "net income" analysis, upheld a money laundering conviction on facts that are essentially indistinguishable from the facts of this case. In *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994), the defendants were convicted of a conspiracy to violate both the federal gambling statute, by conducting an unlawful video poker machine business, and Section 1956(a)(1)(A)(i), by using the proceeds of the operation to pay employees and to purchase machines. One of the defendants contended on appeal that collecting, dividing, and transferring the receipts of the gambling machines were essential facets of the gambling business and therefore could not constitute the separate crime of money laundering. Rejecting that claim, the court of appeals held that "the money, once collected from the poker machines, became 'proceeds of specified unlawful activity' within the meaning of the money laundering statute. Accordingly, any subsequent financial transaction involving these proceeds that promotes or furthers the illegal gambling business could form the basis of a charge of money laundering." *Id.* at 980.

Although the Seventh Circuit acknowledged that "[t]he theory of prosecution in *Conley* was the same as the theory here" (App. *infra*, 6a), it purported to distinguish *Conley* because the defendant in that case did not argue that there is a difference between "revenues and

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used in that statute means gross receipts rather than net income. See *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). Further, the Fourth Circuit has rejected a "net income" definition of "proceeds" as used in the drug trafficking forfeiture statute, 21 U.S.C. 853. See *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (1996).

proceeds" (*ibid.*). It is clear, however, that the Third Circuit viewed its task as defining the "essential elements" of money laundering (37 F.3d at 976), and it found that the defendants' use of the receipts of the machines to pay the expenses of the operation constituted a prohibited transaction with "proceeds" (*id.* at 980). The result and reasoning in *Conley* cannot be reconciled with the outcome here.

3. The outcome here also cannot be squared with numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of the receipts of illegal activity to compensate accomplices or to pay other costs incurred to conduct the activity. See, *e.g.*, *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (prostitute's payments to escort agency from proceeds of prostitution), cert. denied, 122 S. Ct. 1638 (2002); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir.) (drug proceeds used to pay antecedent drug debt), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay drug couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (drug proceeds used to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud scheme to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Cos-*

carelli, 105 F.3d 984, 990 (proceeds of telemarketing fraud used to pay co-conspirators and cover overhead expenses), vacated, 111 F.3d 376 (1997), reinstated, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (use of proceeds from fraud scheme to compensate individuals for referring victims); *Skinner*, 946 F.2d at 177-178 (use of drug proceeds to pay supplier).

To the extent that the Seventh Circuit has excluded from the money laundering statute transactions in which the defendant replenishes the stock-in-trade of an illegal business or otherwise uses the revenue of an illegal enterprise to continue or to expand the business, its decision also cannot be reconciled with many other appellate decisions upholding convictions under Section 1956(a)(1)(A)(i) against claims of evidentiary insufficiency. See, *e.g.*, *United States* v. *Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (use of proceeds from Ponzi scheme to pay "interest" to "dissatisfied" investors to promote continuation of fraudulent scheme), cert. denied, 122 S. Ct. 1942 (2002); *United States* v. *Barragan*, 263 F.3d 919, 924 (9th Cir. 2001) (use of drug proceeds to rent motel rooms for conducting future drug deals); *United States* v. *Meshack*, 225 F.3d 556, 572-573 (5th Cir. 2000) (use of drug proceeds to pay for truck used in later drug sales), cert. denied, 531 U.S. 1100 (2001); *Torres*, 53 F.3d at 1137 n.6 (use of drug proceeds to buy drugs for future sale); *United States* v. *Munoz-Romo*, 947 F.2d 170, 177-178 (5th Cir. 1991) (use of drug proceeds to pay for car used in later drug transactions), cert. denied, 506 U.S. 802 (1992); see also cases cited in note 2, *supra*. Although the defendants in those cases did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds, the holdings of those cases reflect the understanding (which was universally accepted

until the decision in this case) that the statute prohibits the use of the revenue from criminal activity to pay for the overhead and expansion of that activity.

4. Indeed, before this decision, the Seventh Circuit itself understood the money laundering statute to prohibit such transactions. See, *e.g.*, *United States* v. *Febus*, 218 F.3d 784, 787-788 (2000) (use of proceeds from illegal lottery to pay operation's collectors and winning players); *United States* v. *Masten*, 170 F.3d 790, 797-798 (1999) (use of proceeds of investment fraud to pay commissions to company's distributors); *Jackson*, 935 F.2d at 840-841 (use of drug proceeds to buy beepers for drug business). The government filed a petition for rehearing en banc asking the Seventh Circuit to resolve the tension between this case and its prior decisions, but an evenly-divided court (with Judge Williams recused) denied the petition. App., *infra*, 8a-9a.

There is no sufficient reason for this Court to await further developments in the Seventh Circuit before reviewing the question presented. In order for the Seventh Circuit to have another opportunity to consider the issue en banc, it would appear that the government would have to file a "test case" indictment barred by this decision, and the district court would have to dismiss the indictment on that basis, after which the government would have to appeal and seek initial hearing en banc. There is no guarantee, however, that the district court would dismiss the indictment and thus enable an appeal; instead, the court could allow the case to go to trial and later grant a judgment of acquittal or simply instruct the jury that "proceeds" means "profits." In either of those situations, the government would not be permitted to appeal. Even if the case reached the court of appeals (or if a case on

collateral attack raised the issue), there is no assurance that rehearing en banc would be granted to address the issue whether "proceeds" means "profits," or that the court would eliminate the conflict over the interpretation of the term "proceeds." As noted, in *United States* v. *Masters*, 924 F.2d at 1369-1370, the court had previously indicated that "proceeds" in the RICO forfeiture statute means "net, not gross, revenues—profits, not sales." See note 1, *supra*. Under these circumstances, this Court's intervention is warranted at this time.

C. The Question Presented Is Of Recurring Importance

Review at this juncture is particularly appropriate because the question presented is important, and the factual scenario that raises that question is a recurring one. Most money laundering prosecutions under the promotion subsection of the statute involve the use of revenue from criminal activity to pay the expenses of that activity or to fund its continuation or expansion. Those money laundering prosecutions are a vital part of the government's efforts to combat organized crime, drug trafficking, illegal gambling, and fraud. The court of appeals' decision, even if it is read narrowly, significantly constricts the scope of the money laundering statute and thereby impairs those law enforcement efforts. See pp. 11-12, *supra*. If the decision is read broadly, as statements in the opinion suggest it will be, see App., *infra*, 3a, the ruling will essentially eviscerate the promotion subsection of the money laundering statute, because reinvestment of the revenue from illegal activity will violate that provision only in the rare cases in which the revenue is used to fund a *different kind* of illegal activity.

The burdens on the effective enforcement of the congressional prohibition against money laundering have been outlined above. The government will be required to prove in every case that the criminal activity that generated the laundered funds produced a profit and that the funds involved in the laundering transaction represent a part of that profit. That requirement will be extremely burdensome because criminal businesses do not generally keep accounting records, and even less frequently keep accurate ones. In addition, "profits" and "net income" are not concepts with clear meanings but depend on the application of accounting principles. The court of appeals' definition will thus prove as problematic for courts as for prosecutors. And the court of appeals' rule will insulate from money-laundering liability defendants whose illegal businesses have, as yet, failed to turn a profit. It makes little sense to give a money-laundering defense to drug dealers, gamblers, and racketeers whose expenses over a period of time have happened to exceed their revenues. See pp. 10-11, *supra*.

Those burdens on the government and the courts will arise in *all* money laundering cases because the government must establish that a financial transaction involves the "proceeds" of specified unlawful activity even in a case brought under the concealment (rather than the promotion) subsection of the statute. See 18 U.S.C. 1956(a)(1) (using the word "proceeds" in the introductory language that applies to both subsections); App., *infra*, 7a (holding that "the word 'proceeds' in *§ 1956(a)(1)* denotes net rather than gross income") (emphasis added). Thus, even when a transaction is explicitly designed to conceal or to disguise the illicit origins of the funds, a defendant will evade conviction unless the government can demonstrate that the funds

represent profits rather than gross receipts. Because the court of appeals' decision, if allowed to stand, will pose broad and serious obstacles to enforcement of the congressional proscription of money laundering, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-1291, 01-1292

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI,
DEFENDANTS-APPELLANTS

Argued: Jan. 15, 2002
Decided: Feb. 28, 2002

Before: FLAUM, Chief Judge, and COFFEY and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

A financial transaction involving the "proceeds" of crime, and designed to promote the carrying on of certain offenses, is unlawful money laundering. 18 U.S.C. § 1956(a)(1). Neither the Supreme Court nor this circuit has defined the word "proceeds", and there is no definition in the statute itself. This case presents the question whether "proceeds" refers to the gross income from an offense, or only the net income. We conclude that, at least when the crime entails voluntary, business-like operations, "proceeds" must be net income; otherwise the predicate crime merges into money laundering (for no business can be carried on without

expenses) and the word "proceeds" loses operational significance.

The business in this case is gambling, which is unlawful in Illinois unless licensed by the state. OK Amusement, of which Robert Cechini was sole proprietor, provided video poker machines to bars, taverns, and restaurants (collectively, the retail outlets). Patrons dropped coins into the machines and received on-screen "credits" if they won. These credits could be used lawfully to continue playing, or unlawfully as the basis of cash payouts. Many retail outlets redeemed credits for cash. Later, when Cechini or Lawrence Scialabba, his assistant, opened the coin boxes, the contents would be split with the outlet's owner: some went to cover the payments made to customers, some was retained by the owner as compensation for his role in the business, and defendants kept the rest as compensation for the machines—which OK Amusement not only supplied but also fixed (if they broke down) or replaced (if they were seized in raids by the police).

Cechini and Scialabba have been convicted of running an unlawful gambling business, see 18 U.S.C. §§ 371, 1955; filing tax returns that failed to report their income from this business, see 26 U.S.C. § 7206(1); and conspiring to defeat tax collection from the outlets' owners, see 18 U.S.C. § 371. They do not appeal from any of these convictions. But they do appeal from the money laundering convictions, because under the version of the Sentencing Guidelines in force before November 1, 2001, the money laundering convictions substantially augmented their prison terms. Compare *United States v. Buckowich*, 243 F.3d 1081 (7th Cir. 2001), with Amendment 634, effective November 1, 2001. See also *United States v. Perez*, 249 F.3d 583 (7th

Cir. 2001). Scialabba's base offense under the old version of U.S.S.G. § 2S1.1 was 31, producing a sentencing range of 108-135 months (and a sentence of 108 months); with no money laundering counts the offense level would have been 21 and the range 37-46 months. Cechini's base offense level was 34, with a range of 235-293 months; he received a sentence of 188 months (the bottom of the range for level 32, after the district court made an error in addition); but without the money laundering convictions his offense level would have been 23 and the sentencing range 84-105 months.

According to the prosecutor, Cechini and Scialabba violated § 1956(a)(1) when they handed some of the money in the coin boxes over to the outlets' owners and used more of that revenue to meet the expenses of the business (such as leasing the video poker machines and obtaining amusement licenses for them from the state). This is equivalent to saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on. An embezzler who spent part of the take on food and rent, in order to stay alive to cook the books again, would be a money launderer too. Yet none of these transactions entails financial transactions to hide or invest profits in order to evade detection, the normal understanding of money laundering. Nor were Cechini or Scialabba charged with reinvestment in seemingly legitimate businesses or other means to whitewash (= "launder") the funds; the focus was entirely on the disposition of the gross income. Thus the money laundering convictions depend on the proposition that gross income is "proceeds" under the statute.

Here is the text of § 1956(a)(1):

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—(A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or (B) knowing that the transaction is designed in whole or in part—(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

The prosecutor's argument is plain meaning: Divvying up income with tavern owners is a "financial transaction which involves the proceeds" (etc.). According to the United States, two opinions support its plain-meaning view: *United States v. Conley*, 37 F.3d 970 (3d Cir. 1994), and *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998). We do not read these cases so; and the meaning of this statute is not at all plain because it lacks a definition of "proceeds" and the context does not reveal whether the reference is to gross receipts or net income.

Treating the word as a synonym for receipts could produce odd outcomes. Consider a slot machine in a

properly licensed casino. Gamblers insert coins, and the machine itself returns some of them as winnings. Later the casino opens the machine and removes the remaining coins. What are the "proceeds" of this one-armed bandit: what's left in the cash box, or the total that entered through the coin slot? At oral argument the prosecutor sensibly replied that the "proceeds" do not exceed what's left after gamblers have received their jackpots; yet the only difference between the slot machine and the video poker machine is that the slot machine is automated and pays gamblers directly. Likewise, one would suppose, the "proceeds" of drug dealing are the *profits* of that activity (the sums available for investment outside drug markets), the net yield rather than the gross receipts that must be used to buy inventory and pay the wages of couriers. It would have been easy enough to write "receipts" in lieu of "proceeds" in § 1956(a)(1); the Rule of Lenity counsels against transmuting the latter into the former and catching people by surprise in the process.

If Congress had levied a tax on the "proceeds" of a casino, most speakers of English would understand this as a tax on the profits of the business (what's left after paying suppliers and the winning gamblers) rather than on the amount wagered. It makes sense to read "proceeds" in § 1956(a)(1) the same way. If instead the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. See, e.g., *Heflin v. United States*, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed .2d 407 (1959); *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.

Ed. 2d 70 (1978); *Busic v. United States*, 446 U.S. 398, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.

Mankarious offers the prosecutor no support. The defendants were charged with mail fraud and money laundering, among other things. They received money from the mail fraud before they used the mail, which served to disguise their preceding fraud. The defendants engaged in transactions with this money before the mailing and argued that these funds can not be "proceeds" from mail fraud until the mail fraud is complete. We held, to the contrary, that a fraudulent *scheme* involving mail (for the federal crime is the whole scheme) can generate "proceeds" before the mailings have been completed. That decision has nothing to do with the difference between gross and net income; the distinction played no role in *Mankarious*, which was about timing rather than the difference between "proceeds" and "receipts."

Conley is closer to the mark but does not hit it. The theory of prosecution in *Conley* was the same as the theory here: that using gross revenues of a gambling business to pay suppliers and employees violates § 1956(a)(1). But the defense differed. Instead of arguing that there is a difference between revenues and proceeds, the defendants in *Conley* embraced the idea that receipts equal "proceeds" and used that as the fulcrum of a contention that prosecution for both gambling and money laundering violates the double jeopardy clause of the fifth amendment, because proof of gambling shows money laundering too. The Third

Circuit rejected that variation on the "same transaction" approach to double jeopardy, remarking that the statutory *elements* of the offenses differ, and the Supreme Court has held that it is the elements of the crime rather than the underlying transactions that define an "offence" for purposes of the double jeopardy clause. See *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). *Conley* accepted the parties' shared assumption that "proceeds" means gross income. It did not consider, and thus did not resolve, the question before us today. Nor does our opinion in *United States v. Jackson*, 935 F.2d 832, 839-42 (7th Cir. 1991), resolve it. Some of the transactions said to be money laundering in that prosecution involved the purchases of business supplies, but other transactions involved reinvestment of net profits; the court was not asked to, and did not, decide whether all gross receipts are "proceeds." We now hold that the word "proceeds" in § 1956(a)(1) denotes net rather than gross income of an unlawful venture.

The money laundering convictions are vacated, and the matter is remanded to the district court for resentencing on the other convictions. This may affect the amount of forfeiture (previously set at about $3 million), so it would be premature to address the defendants' arguments that this sum was miscalculated.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 01-1291, 01-1292

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI,
DEFENDANTS-APPELLANTS

May 22, 2002

Appeals From The United States District Court For
The Northern District Of Illinois, Eastern Division.

No. 99 CR 296
Ruben Castillo, Judge.

ORDER

Before: Flaum, Chief Judge, and COFFEY and EASTERBROOK, Circuit Judges.

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on April 15, 2002. A vote of the

active members of the court was requested* and the petition for rehearing en banc was denied by an equally divided court.** All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Williams did not participate in the consideration of this matter.

** Judges Posner, Ripple, Manion, Kanne and Diane P. Wood voted to grant rehearing en banc.

OPPOSITION

BRIEF

SUPREME COURT, U.S.
FILED
NOV 4 2002
OFFICE OF THE CLERK

No. 02-442

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTION PRESENTED

In the absence of a bona fide circuit split over the question resolved by the court of appeals, should this Court grant certiorari where the court of appeals interpreted the word "proceeds," as used in the federal money laundering statute, according to a common and accepted meaning and in a manner that ensures distinction between the underlying offenses producing laundered funds and money laundering?

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STATEMENT OF THE CASE

1. Respondent Robert T. Cechini operated a sole proprietorship known as OK Amusement ("OK"), which was in the business of placing arcade machines in taverns, restaurants and bowling alleys ("retail outlets") in Chicago's western suburbs. District Court Record Document ("R") 50; Respondents' Court of Appeals Brief ("C.A. Br."), Supplemental Appendix ("S.A.") 1. Respondent Scialabba sometimes helped Cechini. Trial Transcript ("Tr."). 153, 382, 405-06, 744, 757-58, 935, 964, 1025, 1075, 1099, 1169, 1284-85, 1352, 1374-75, 1461-62.

Many of the machines were used for gambling. "Patrons dropped coins into the machines and received on-screen 'credits' if they won. These credits could be used lawfully to continue playing, or unlawfully as the basis of cash payouts. Many retail outlets redeemed the credits for cash." *United States v. Scialabba*, 282 F.3d 475, 475-76 (7th Cir. 2002); Pet. App. 2a.

The respondents usually collected money from the machines on a weekly basis by opening the meter compartment and determining the amount of money deposited into the machine and paid out. Tr. 151, 196, 234-37, 239, 264, 368, 468-70, 527, 549, 746, 765-66, 772-74, 794-95, 827, 867-69, 945, 950, 1025-26, 1071-72, 1133-34, 1168-72, 1230-31, 1268-69, 1284, 1304, 1359-61, 1373-74, 1377, 1381, 1431-32. After deduction of the payouts, the Respondents and retail outlet employees split the spoils. Tr. 145-46, 150, 194-95, 236-37, 262, 298-301, 368-73, 380-81, 470-71, 505, 509, 528-29, 746-47, 827, 892-93, 939, 947-49, 977-78, 1072, 1173, 1229, 1269, 1282-85, 1376.

Illinois requires annual licensing of coin operated amusement devices in public places. Tr. 687, 691-92.

Respondent Cechini used cash revenues from the machines to purchase the licenses. Tr. 156, 217, 243, 262, 273, 305, 481-82, 514, 554-55, 691-700, 752, 758-59, 953, 1044, 1084, 1114, 1135, 1181-82, 1241, 1275, 1285, 1315-16, 1421-22, 1635-36.

OK leased the machines from Universal Amusement Company. Tr. 392-96, 1449-50, 1703. The respondents invariably paid the weekly lease payments with cash. Tr. 1457-59, 1479, 1481.

A federal grand jury returned an indictment charging the respondents with conspiracy to conduct an illegal gambling business, 18 U.S.C. § 371, conducting an illegal gambling business, § 1955, conspiracy to impede functions of the Internal Revenue Service, § 371, conspiracy to commit money laundering, § 1956(h), and money laundering, § 1956(a)(1)(A)(i). Respondent Cechini, alone, was charged with seven counts of making material false statements on tax returns, 26 U.S.C. § 7206(1). R. 50; S.A. 45-54.

The money laundering counts alleged that the respondents used the proceeds of the specified crimes "with the intent to promote the carrying on of specified activity" in violation of § 1956(a)(1)(A)(i). None of the money laundering counts charged the respondents with using the proceeds of the specified crimes "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" in violation of § 1956(a)(1)(B)(i). The financial transactions identified in the twelve substantive money laundering counts involved the respondents' acts of

1) dividing machine revenues with retail outlet personnel; 2) purchasing state licenses for the machines; and 3) making lease payments for the machines.

The money laundering statute has been criticized on grounds that "aggressive federal prosecutors" deploy it to "secure more draconian sentences and increase the population of the already overcrowded federal prisons." *United States v. Montague*, 29 F.3d 317, 318 (7th Cir. 1994). Respondents' counsel echoed such concerns during the pendency of this litigation. Respondents attempted to negotiate a plea agreement (by which the respondents would plead guilty to non-money laundering counts) but were unsuccessful. 1/29/00 Tr. 20-21. As respondents' trial counsel informed the district court, the respondents went to trial "because of the money laundering counts." Tr. 1758.

During the jury instructions conference, respondents moved to dismiss the money laundering counts. Tr. 1759-62; S.A. 59-62. The district court denied the motion. Tr. 1766. The jury convicted the respondents on all counts.

At the time of sentencing (January 2001), money laundering convictions carried substantial prison sentences pursuant to a base offense level that the United States Sentencing Commission dubbed "arbitrarily determined." *See* U.S.S.C., *Sentencing Policy for Money Laundering Offenses, Including Comments on Department of Justice Report* 9 (Sept. 18, 1997); R. 84, Ex. C; S.A. 129. The district court rejected the respondents requests to depart downward from the money laundering guideline, and sentenced Respondent Cechini to 188 months

imprisonment. R. 102. Respondent Scialabba, a first time offender, was sentenced to 108 months imprisonment. R. 103.[1]

2. The respondents appealed. They did not contest their gambling or tax convictions, but challenged their money laundering convictions and sentences on a variety of grounds. *See* Respondents' C.A. Br. The Seventh Circuit addressed one issue: whether the word "proceeds" as used in the money laundering statute "refers to the gross income from an offense, or only the net income." *Scialabba*, 282 F.2d at 475; Pet. App. 1a. The court unanimously held that "the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture." 282 F.2d at 478; Pet. App. 7a. The court vacated the respondents' money laundering convictions and remanded for resentencing on the gambling and tax counts. *Id.*[2]

The government petitioned for rehearing with suggestion for rehearing en banc. The Seventh Circuit equally divided over whether to hear the petition. Judges Coffey, Easterbrook and Flaum, the panel judges, and Judges Evans and Rovner voted to deny the petition.

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[1] During the pendency of the respondents' direct appeal, an amendment to the money laundering sentencing guideline went into effect *See* U.S.S.C., Amendment 634. As the court of appeals recognized, application of the amended guideline would substantially lower the prison sentences. *Scialabba*, 282 F.2d at 476.

[2] Because the court of appeals vacated the money laundering convictions, it did not address other issues raised by the respondents. Grant of certiorari and a ruling favorable to the government thus would not end this litigation.

3. The government filed a petition for certiorari on September 19, 2002. The Clerk of this Court allowed the respondents' request to extend the time for the filing of this response until November 4, 2002.

REASONS FOR DENYING THE WRIT

The Seventh Circuit did no more than define the word "proceeds," as used in the federal money laundering statute, pursuant to well-established canons of construction. By defining "proceeds" as net income, the court of appeals did not deviate from the context or purpose of the money laundering statute. Moreover, no developed circuit split exists over the issue of whether "proceeds" refers to net or gross income; the cases cited in the certiorari petition have not confronted this particular question. The predicted prosecution obstacles are overstated and speculative. As the government has not established compelling reasons for the grant of certiorari, U.S. Sup. Ct. R. 10, the petition for certiorari should be denied.

A. The Court of Appeals Did Not Err in its Construction of the Money Laundering Statute

1. The Seventh Circuit found that the term "proceeds" as used in 18 U.S.C. § 1956 refers to net income. The government claims that this interpretation does not comport with the "most common and primary meaning" of "proceeds," which, according to the government, is gross receipts or total revenue. Pet. 8-9. Contrary to the government's position, the court of appeals did not ignore the common and primary meaning of "proceeds." The *Oxford*

Dictionary and Usage Guide to the English Language (1995) defines "proceeds" as "profits from sale." *Id.* at 460. The first definition of the plural form of "proceed" in *The New Oxford American Dictionary* (2001) is "that which proceeds, is derived from, or results from something; that which is obtained or gained by any transaction; produce; outcome; *profit*. *Id.* at 544 (emphasis added). The initial definition of the plural form of "proceed" in the *American Heritage Dictionary* (4th ed.) is "[t]he amount of money derived from a commercial or fundraising venture; *the yield*. *Id.* at 1398 (emphasis added). Thus, unlike *Muscarello v. United States*, 524 U.S. 125 (1998), the government here does not emerge as a clear winner in the war of dictionaries. The foregoing definitions undercut the government's contention that "the most common and primary meaning" of "proceeds" is gross receipts or total revenue.

Moreover, even the dictionaries that define "proceeds" by placing gross before net, do not *exclude* net. As the government admits, "profits" is the second definition of "proceeds" in the *Random House Dictionary of the English Language* (2nd ed. 1987). Pet. 8.[3] The *Webster's Third New International Dictionary* definition includes "net profits" as its second definition. The *Black's Law Dictionary* edition also lists a definition of "net proceeds" under

[3] The first definition cited by the government – "something that results or accrues" and "the total amount derived from a sale or other transaction" – could refer to the net. A "result" is typically the end product, i.e., profits. The same is true of "the total amount *derived*." Whether "the total amount *derived*" refers to gross or net depends on the point in time at which a transaction is measured, i.e., before or after the deduction of costs.

"proceeds." *See Black's Law Dictionary* 1222 (7th ed. 1999).[4]

"The meaning of statutory language, plain or not, depends on context." *E.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). The government has not established that the court of appeals' definition of "proceeds" diverges from statutory context. Section 1956 is significant for what it lacks – it does not define "proceeds" as "gross receipts" or the like. As the court of appeals observed, "It would have been easy enough to write 'receipts' in lieu of 'proceeds' in § 1956(a)(1)." *Scialabba*, 272 F.3d at 477; Pet. App. 5a. The government provides no answer to this.[5]

A statute's purpose can also shed light on the meaning of its terms. *E.g., Holloway v. United States*, 526 U.S. 1, 6

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[4] The *Black's Law Dictionary* definition cited by the government derives from a single, non-criminal case (*State Highway Commission v. Spainhower*, 504 S.W.2d 121, 125 (Mo. 1973)). *See Black's Law Dictionary* 1204 (6th ed. 1990). The previous edition of *Black's Law Dictionary* referred to the concept of net proceeds in the body of the "proceeds" definition. *See Black's Law Dictionary* 1204 (6th ed. 1990) (defining "proceeds," *inter alia*, as "the funds received from disposition of assets or from the issue of securities (after deduction of all costs and fees)").

[5] And it is not as if the term "gross receipts" is forbidden fruit in statutory codification. *See, e.g.*, U.S.S.G. § 2B1.1(b)(12)(A). Conversely, courts are not immune from conducting net-based determinations. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, supp. at 188 (1998-2001) (noting that the amendments to the loss/benefit tables in the United States Sentencing Guidelines codified "the 'net loss' approach that has developed in the case law, with some modifications," and that "[t]his crediting approach is adopted because the seriousness of the offense and the culpability of a defendant is better determined by using a net approach"); *see also United States v. Sapoznik*, 161 F.3d 1117, 1119 (7th Cir. 1998) (for purposes of U.S.S.G. § 2C1.1 (1998) "[t]he government concedes that the relevant 'benefit received' is indeed profit (net revenue) and not (gross) revenue").

(1999); *Bailey v. United States*, 516 U.S. 137, 145 (1995). Construing § 1956 in light of its purpose, the government fails to make a case for this Court's review. Federal money laundering statutes create a crime separate from the offenses producing the laundered funds. This Court and others have recognized as much. *See United States v. Cabrales*, 524 U.S. 1, 7 (1998) (money laundering statutes do not interdict "the anterior criminal conduct that yielded the funds allegedly laundered"); *United States v. Mankarious*, 151 F.3d 694, 704 (7th Cir. 1998) ("money launderer must obtain proceeds before laundering can take place"); *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995) ("proceeds" means "funds obtained from prior, separate criminal activity"); *United States v. Conley*, 37 F.3d 970, 979 (3rd Cir. 1994) ("Congress did not enact money laundering statutes simply to add to the penalties for various crimes in which defendants make money."); *United States v. Sanders*, 929 F.2d 1466, 1471-72 (10th Cir. 1991) (the money laundering statute cannot be converted into a "money spending statute"). The money laundering statutes' legislative history supports the distinction between crimes producing proceeds and money laundering offenses. As stated in *United States v. Edgmon*, 952 F.2d 1206, 1213-14 (10th Cir. 1991):

> Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered. The senate report on § 1956 expresses the need for a federal criminal offense aimed directly at the activity of laundering the money gained from illegal activity. The Senate report on the money laundering bill makes plain that the bill was intended to create

> a 'new Federal offense against money laundering.' Sen.R. 99-433 at 4. The discussion throughout the report is of the gap in the criminal law with respect to the post-crime hiding of the ill-gotten gains. *See id.* at 1-9. The Senate report and the statute itself indicate that the Congress intended simply to add a new criminal offense to punish activity that was not previously punished criminally. Congress aimed the crime of money laundering at conduct that follows in time [sic] the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.' Congress enacted the money laundering statute to provide a punishment in addition to other punishment rather than instead of other punishment. We find that Congress intended money laundering and the 'specified unlawful activity' to be separate offenses separately punishable.

See also United States v. Butler, 211 F.3d 826, 830 (4th Cir. 2000); *Savage*, 67 F.3d at 1441.

The government does not dispute the need to distinguish "between a money laundering transaction and the underlying crime." Pet. 14. Defining the term "proceeds" as net income, as the court of appeals did, provides a pragmatic method of separating money laundering from underlying criminal activity. In view of net being a well-recognized definition of "proceeds," the money laundering statute's failure to define "proceeds" as "receipts" and the fact that money laundering must remain separate from the offenses producing laundered funds, the court of appeals did not reach an "unnatural and illogical" construction of the term "proceeds." In fact, as the court of appeals noted, a net profit definition of "proceeds" prevents odd outcomes, e.g., taxation of a slot machine in a

properly licensed casino. *Scialabba*, 272 F.3d at 477; Pet. 4a-5a. That the government disagrees with the manner in which the court of appeals reached the result does not provide grounds for certiorari. *Cf.* U.S. Sup. Ct. R. 10.

There is also the rule of lenity. If the ambiguity associated with § 1956's failure to define "proceeds" is not resolved by application of statutory construction canons, then the rule of lenity – which breaks ties in the defendant's favor, *United States v. Krilich*, 159 F.3d 1020, 1028 (7th Cir. 1998) – would come to play. *See, e.g., United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Kozminski*, 487 U.S. 931, 952 (1988). Here, the rule of lenity shows that the Seventh Circuit did not commit grievous error worthy of grant of certiorari.

2. The government relies on the legislative history to the amended version of RICO's forfeiture provision. Pet. 10 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983)). But RICO's forfeiture provision is not at issue in this case. If the circuits have split over construction of RICO's forfeiture provision, then a RICO forfeiture case squarely presenting such an issue would be the appropriate vehicle for resolution, rather than this case. Furthermore, legislative history to a collateral statute is not the most persuasive source for interpreting the statute at hand. *See Sullivan v. Finkelstein,* 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously"); *Reves v. Ernst & Young*, 494 U.S. 56, 79 (1990) (Rehnquist, C.J., concurring in part and dissenting in part) ("to bodily transpose . . . legislative history to another statute has little to commend it as a method of statutory construction"). RICO's legislative history also may not hold the weight attributed by the

government. The quoted RICO legislative history emanated from a concern for prosecutorial burdens in forfeiture matters and does not necessarily dictate that "proceeds" means gross receipts. *See* Note, *Scope of Criminal Forfeiture Under RICO: The Appropriate Definition Of "Proceeds,"* 66 U. Chi. L. Rev. 1289, 1294 (1999); *see also United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996) (construing "proceeds" in RICO's forfeiture provision to mean "something less than the gross receipts of a defendant's . . . business.").

3. The government advances a series of arguments in which it essentially contends that the court of appeals misconstrued the promotion element of the money laundering statute. For certiorari purposes, the government's position is flawed since the lower court's disposition did not depend on construction of the promotion prong.

Parsing language from the Seventh Circuit's opinion, the government accuses that court of "assum[ing] that the statute prohibits only transactions designed to conceal illegal activity." Pet. 11. This charge lacks substance, as the Seventh Circuit quoted the money laundering statute in its opinion, and has often acknowledged the distinction between the promotion and concealment prongs. *See United States v. Kosmel*, 272 F.3d 501, 509 n. 4 (7th Cir. 2001); *United States v. Emerson*, 128 F.3d 557, 565 (7th Cir. 1997); *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991). There is no reason to believe that the circuit judges, who are presumed to know the law, *cf. Lambrix v. Singletary*, 520 U.S. 518, 532 (1997), disregarded statutory language or precedent. The government also does not quote the entire sentence with which it quibbles. The court of appeals expressly addressed reinvestment (*ergo* promotion), stating, "Nor were Cechini or Scialabba charged with

reinvestment in seemingly legitimate businesses or other means to whitewash (= "launder") the funds; the focus was entirely on the disposition of the gross income." *Scialabba*, 282 F.2d at 476; Pet. App. 3a. In addition, the panel distinguished a leading promotion case in the Seventh Circuit, *Jackson*, 935 F.2d 832, stating:

> Some of the transactions said to be money laundering in that prosecution involved the purchases of business supplies; but other transactions involved reinvestment of net profits; the court was not asked to, and did not, decide whether all gross receipts are 'proceeds.'

Scialabba, 282 F.2d at 478; Pet. App. 7a.

The government further maintains that the court of appeals "erred in using" an intent to conceal element "as a guidepost for construing" the promotion prong. Pet. 12. The government paints with too broad a brush. As opposed to employing "guideposts" to interpret the promotion prong, the court of appeals' decision depended upon the definition of "proceeds." The meaning of "proceeds" is conceptually distinct from the promotion or concealment elements. *E.g., United States v. Febus*, 218 F.3d 784, 789 (7th Cir. 2000).

The government also postulates that "one reading" of the Seventh Circuit's opinion "constitutes a dramatic curtailment of the statute as it has traditionally been understood" and potentially excludes "*all* transactions in which ill-gotten funds are *reinvested* into an ongoing criminal enterprise, even if those transactions promote *continued or expanded* criminal activity." Pet. 12-13 (emphasis original). Speculation regarding a potential

interpretation of a judicial opinion is not fodder for certiorari jurisdiction.

Throughout this prosecution, the government has asserted that the respondents "violated § 1956(a)(1) when they handed some of the money in the coin boxes over to the outlets' owners and used more of that revenue to meet the expenses of the business (such as leasing the video poker machines and obtaining amusement licenses for them from the state)." *Scialabba*, 282 F.3d at 476; Pet. App. 3a. In providing the examples questioned in the certiorari petition, the court of appeals stated:

> [The government's position is] equivalent to saying that every drug dealer commits money laundering by using receipts from the sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next and so on. An embezzler who spent part of the take on food and rent, in order to stay alive to cook the books again, would be a money launderer too.

Id. The government says "[a] large majority of prosecutions under the promotion subsection of the statute involve precisely those kinds of financial transactions." Pet. 13. The government's disagreement regarding the implications of examples mentioned in dicta should not supply grounds for grant of certiorari.

The government also overstates its position. In *Jackson*, the Seventh Circuit found transactions akin to the examples discussed in the lower court's opinion here did not constitute money laundering. Specifically, *Jackson* determined that the government had not established the commission of money laundering offenses with respect to

transactions by which the defendant used funds from crack sales to pay for cellular phones, rent and checks written to cash. The court observed that "certainly these expenditures maintained [the defendant's] lifestyle, but more than this is needed to establish that they promoted his drug activities." *Jackson*, 935 F.2d at 841.

4. The government fears that the court of appeals' decision will make money laundering prosecutions more difficult. Pet. 10-11. But this does not merit grant of certiorari. In *Ashcroft v. The Free Speech Coalition*, ___ U.S. ___, 122 S.Ct. 1389 (2002), this Court recently addressed a government argument grounded in purported "difficulty of prosecution." This Court reached its holding (that portions of the Child Pornography Prevention Act of 1996 violated the First Amendment) in spite of the government's argument "that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children." 122 S.Ct. at 1404.

In addition, the government's concerns are speculative. Although the government attempts to disavow resort to accounting principles in criminal cases, it has not cited any instance in which use of an accounting method has unduly stymied a money laundering prosecution. By nature, money laundering is a financial crime; therefore, it is not unreasonable for accounting concepts to play a role in some prosecutions. Even so, a jury's task does not become overly burdensome or complex. In the guilt or innocence phase of a money laundering case, juries are not called upon to arrive at hard and fast numerical conclusions. To the contrary, a jury must determine whether the government has proved that the defendant conducted a prohibited financial transaction with the "proceeds" of

specified unlawful activity. The distinction between net and gross can easily be presented to a jury by including the word "net" in the jury instructions. And this case illustrates that application of accounting principles in a money laundering prosecution is not an unduly complex endeavor. It does not take a Wharton's School of Business graduate to deduce that the charged money laundering transactions (i.e., the division of machine revenue, purchase of State licenses and machine lease payments) were conducted with the gross receipts of gambling activity.

B. Grant of Certiorari Is Not Warranted Based on the Government's Claim that the Court of Appeals' Decision "Departs from the Approach" of Other Courts of Appeals

The government does not cite a genuine circuit split. Rather, it contends that the lower court decision here "departs from the approach of other courts of appeal." Pet. 16.

1. *United States v. Conley*, 37 F.3d 970 (3rd Cir. 1994), involved video poker machines. The government postulates that "the result and reasoning in *Conley* cannot be reconciled with the outcome here." Pet. 18. The government's representations regarding *Conley's* procedural posture are inaccurate. Discussing *Conley*, the certiorari petition states it "upheld a money laundering conviction on facts that are essentially indistinguishable from the facts of this case." Pet. 17. The certiorari petition further declares that the *Conley* "defendants were convicted of a conspiracy to violate both the federal gambling" and money laundering statutes. *Id.* The *Conley* defendants, however, were not "convicted," nor did *Conley* uphold "a

money laundering conviction." As opposed to examining a conviction, *Conley* involved a government appeal of the district court's pretrial order dismissing the money laundering object of a conspiracy count on double jeopardy grounds. *See Conley*, 37 F.3d at 971.

The underlying issue in *Conley* is different than here. In *Conley*, the district court dismissed the money laundering object of a conspiracy charge because it viewed conspiracy to commit money laundering and conducting an illegal gambling business as amounting to the "same offense" under the Double Jeopardy Clause. In contrast, the respondents in this case did not raise a double jeopardy challenge. The court of appeals in this case distinguished *Conley* as follows:

> The theory of prosecution in *Conley* was the same as the theory here: that using gross revenues of a gambling business to pay suppliers and employees violates § 1956(a)(1). But the defense differed. Instead of arguing that there is a difference between revenues and proceeds, the defendants in *Conley* embraced the idea that receipts equal "proceeds" and used that as the fulcrum of a contention that prosecution for both gambling and money laundering violates the double jeopardy clause of the fifth amendment, because proof of gambling shows money laundering too. The third circuit rejected that variation on the "same transaction" approach to double jeopardy, remarking that the statutory *elements* of the offenses differ, and the Supreme Court has held that it is the elements of the crime rather than the underlying transactions that define an "offence" for purposes of the double jeopardy clause. See *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). *Conley*

> accepted the parties' shared assumption that "proceeds" means gross income. It did not consider, and thus did not resolve, the question before us today.

Scialabba, 272 F.3d at 478; Pet. App. 6a-7a.

Ironically, language from *Conley* is consistent with the respondents' position regarding the counts involving the division of machine revenue. *Conley* stated that "money, once collected from the poker machines, became 'proceeds of specified unlawful activity' within the meaning of the money laundering statute." *Id.* at 980. The phrase "once collected" signals that the machine money must be collected before money laundering can occur – not that the collection of the money itself constitutes money laundering. Here, the division of machine revenue formed the basis for the respondents' convictions on Counts VII-XIII.

2. The government's citation to *United States v. Haun*, 90 F.3d 1096, 1101 (1996), *cert. denied*, 519 U.S. 1059 (1997), and cases citing *Haun*, fares no better. In *Haun*, the defendants argued that the money laundering statute's failure to define "proceeds" rendered the statute unconstitutionally vague. This, however, was not the argument made by the respondents here, nor did the court of appeals address a constitutional challenge. Although *Haun* cited a *Webster's* definition of proceeds that used the words "total revenue," *Haun* did not squarely resolve whether the words "proceeds" as used in the money laundering statute refers to net or gross income. Indeed, the *Haun* defendants did not make such an argument.

3. The government also states that the "outcome here cannot be squared with numerous cases in which courts of appeals have found sufficient evidence to support

money laundering convictions based on the use of the receipts of illegal activity to compensate accomplices or to pay other costs incurred to conduct the activity." Pet. 18. The cited cases did not involve instances in which courts of appeals specifically rejected defense arguments that the word "proceeds" as used in the money laundering statute means net income. None of the cases directly addressed the issue. The claimed circuit split is illusory.

The government also says that "[t]o the extent that the Seventh Circuit has excluded from the money laundering statute transactions in which the defendant replenishes the stock-in-trade of an illegal business or otherwise uses the revenue of an illegal enterprise to continue or to expand the business, its decision also cannot be reconciled with" cited decisions. Pet. 19. The government reads too much into the Seventh Circuit's opinion. The holding here does not prohibit the government from prosecuting cases involving replenishment or reinvestment under the money laundering statute. To the contrary, the court of appeals noted that the respondents were not charged with reinvesting as a means to launder funds. *Scialabba*, 282 F.2d at 476; Pet. App. 3a.

What's more, by acknowledging that the defendants in the cited cases "did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds," Pet. 19, the government recognizes that the cited cases do not raise a true circuit split. If and when such a circuit split arises, exercise of certiorari jurisdiction might be appropriate. At this juncture, however, the lack of a bona fide circuit split over the question resolved by the court of appeals would make grant of certiorari improvident.

C. The Government Has Failed to Show that the Question Presented Is of Recurring Importance

Absent a real circuit split over the question resolved by the Seventh Circuit, the government has failed to show that the question presented is of recurring importance so as to warrant exercise of this Court's certiorari jurisdiction at this time.

The government predicts that broad reading of the court of appeals decision will "essentially eviscerate the promotion subsection of the money laundering statute." Pet. 21. Notwithstanding the government's conditional fear, the Seventh Circuit did not issue a broad opinion. It simply defined a word undefined by statute, and limited its holding to "voluntary, business-like operations." *Scialabba*, 272 F.3d at 475; Pet. App. 1a. Nor did the Seventh Circuit create a "defense" for offenders who fail to turn a profit. Construction of a statutory element relates to the prosecution's burden of proof, and does not entail a "defense." Additionally, the specter of a profitless business escaping the money laundering statute was not the issue in this case. The respondents turned a profit in their business, but were charged with committing money laundering with the gross proceeds of gambling activity. At bottom, the charged money laundering transactions were too closely intertwined with the underlying gambling offense to constitute money laundering. The court of appeals did not err, let alone commit an error worthy of certiorari jurisdiction, in vacating the respondents' money laundering convictions and remanding for resentencing on the remaining counts of conviction.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
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No. 02-442

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LAWRENCE SCIALABBA AND ROBERT T. CECHINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR UNITED STATES

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In the Supreme Court of the United States

No. 02-442

UNITED STATES OF AMERICA, PETITIONER

v.

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Respondents have failed to refute the government's central submission: the decision of the court of appeals warrants review because the court's interpretation of the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), contradicts its text, departs from the approach taken by other courts of appeals, and will impair the statute's effective enforcement.

In holding that "proceeds" means "profits," the court of appeals incorrectly rejected the common understanding of the term, both generally and in related statutes. Moreover, the court's reasoning that the prosecution here departed from "the normal understanding of money laundering" because it did not involve transactions that "hide or invest profits in order to evade detection" (Pet. App. 3a) disregards the statute's express prohibition of transactions made "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. 1956(a)(1)(A)(i).

The court's decision cannot be reconciled with the definition of "proceeds" adopted by the Sixth Circuit in *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), or the results and reasoning of *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994), and numerous decisions of other courts of appeals. Furthermore, the decision subjects the government to an unreasonable burden of proof and enmeshes the courts in complicated issues concerning what accounting principles should govern illegal enterprises. As a result, the decision will significantly impair government efforts to combat serious crime.

1. The decision of the court of appeals is incorrect.

Although respondents contend that "the court of appeals did not ignore the common and primary meaning of 'proceeds'" (Br. in Opp. 5), several of the definitions on which respondents themselves rely show that the court did just that. Respondents note (*id.* at 6) that the first definition of "proceeds" in the *American Heritage Dictionary* 1398 (4th ed. 2000) is "[t]he amount of money derived from a commercial or fundraising venture." Respondents also rely (Br. in Opp. 6) on a definition of "proceeds" the initial entry of which states: "that which proceeds, is derived from, or results from something."[1] Neither of those definitions suggests that "proceeds" refers only to the money that remains after the costs of the venture are deducted. Instead, they

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[1] Respondents incorrectly identify the source of that definition as *The New Oxford American Dictionary* (2001). That dictionary actually defines "proceeds" as "money obtained from an event or activity," *id.* at 1358, which accords with the government's interpretation. The source of the definition cited by respondents is 12 *The Oxford English Dictionary* 544 (2d ed. 1989), and it refers to "profits" only as the last of its five meanings.

accord with the definitions cited in the petition (at 8-9), which indicate that "proceeds" is most commonly understood as "the *total* amount derived from a sale or other transaction." *The Random House Dictionary of the English Language* (2d ed. 1987) (emphasis added); see *Black's Law Dictionary* 1222 (7th ed. 1999). Nor are respondents aided by their observation (Br. in Opp. 6-7) that *Black's Law Dictionary* also contains a definition of "net proceeds." The money laundering statute omits the critical qualifier—"net."

Respondents cite (Br. in Opp. 5-6) only one dictionary that supports their interpretation of "proceeds." See *The Oxford Dictionary and Usage Guide to the English Language* 460 (1995). The government has not located any decision of this Court, however, that relies on that dictionary, which, according to the publisher, is no longer in print. That dictionary, published by Oxford University Press, uses British spellings and lists American spellings as variants. See *id.* at 153. *The Oxford American Dictionary and Language Guide* (1999), a publication by the same publisher that reflects "contemporary American English vocabulary" (*ibid.*) (Preface), defines "proceeds" as "money produced by a transaction or other undertaking," (*id.* at 793), which accords with the government's interpretation.

Respondents are also not assisted (Br. in Opp. 7-10) by the principle that a statute's meaning is informed by its context and purpose. In fact, those considerations support the government's position. Congress presumably intended the word "proceeds" as used in the money laundering statute to have a meaning consistent with the meaning of the same word in related criminal statutes. Just two years before Congress enacted the money laundering statute, Congress added the word "proceeds" to the RICO forfeiture statute. The Senate

Report accompanying the legislation explained that "the term 'proceeds' has been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were." S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Although respondents seek (Br. in Opp. 10-11) to dismiss that powerful contextual evidence because it involves a separate statute, they offer no reason why Congress would have deviated from its approach in the RICO statute when it enacted the money laundering statute shortly thereafter.

Concerns about requiring proof of the defendant's overhead expenses apply with equal force in the money laundering context. Concepts like "net income" or "profits" have concrete meaning only after application of a system of accounting principles. But there is no source of generally accepted accounting principles for criminal enterprises. Thus, application of a "profits" approach would require the courts to undertake the novel, difficult, and essentially futile task of formulating an accounting theory for illegal businesses and the government to bear the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." S. Rep. No. 225, *supra*, at 199 n.24 (quoting *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977)). Respondents point to nothing that suggests that Congress intended that result.

Contrary to respondents' suggestion (Br. in Opp. 7), the absence of any definition of "proceeds" in the statute provides no contextual support for rejecting the word's customary meaning. Nor does Congress's intent that money laundering be discrete from the underlying

crime (*id.* at 8-10) justify that action. The distinction between money laundering and the underlying crime is maintained by the requirement that the money laundering transaction "follow and * * * be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); see Pet. 14-15 (citing cases). The distinctness requirement is not undermined by defining proceeds as gross rather than net receipts because there can be no receipts of *any* kind unless there has already been illegal activity that has generated those receipts.

Respondents dispute (Pet. 11-14) the government's contention that the court of appeals incorrectly assumed that the statute prohibits only transactions designed to conceal illegal activity. But the court's opinion speaks for itself: the court objected to the government's theory of prosecution because, under that theory, a "drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, [and] a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next." Pet. App. 3a. The court thought that those transactions could not constitute money laundering because they do not involve efforts "to hide or invest profits in order to evade detection, the normal understanding of money laundering." *Ibid.* The money laundering statute, however, expressly prohibits financial transactions involving the proceeds of specified unlawful activity made "with intent to promote the carrying on of specified unlawful activity" (18 U.S.C. 1956(a)(1)(A)(i)) regardless whether the perpetrator has an intent to conceal. See Pet. 11-12. Thus, the court's criticism that respondents were not "charged with reinvestment in seemingly legitimate

businesses or other means to whitewash (= 'launder') the funds" (Pet. App. 3a) overlooks the plain language of the statute. Although respondents would dismiss the court's statements as "dicta" (Br. in Opp. 13), the statements were central elements of the court's reasoning. And that reasoning cannot be reconciled with the language of the statute.

In light of the clear support for the "gross receipts" definition of "proceeds," respondents' reliance (Pet. 10) on the rule of lenity is misplaced. The rule of lenity applies only if there is such a "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and ellipsis omitted). There is no ambiguity here.

2. The decision below departs from the approach of other courts of appeals.

Respondents also contend (Br. in Opp. 15-18) that certiorari is not warranted because there is no "genuine circuit split." *Id.* at 15. Respondents fail, however, to refute the government's submission that the court of appeals' decision departs from the construction that other courts of appeals have accorded the money laundering statute. See Pet. 16-21.

Respondents contend (Br. in Opp. 17) that the decision below does not conflict with the Sixth Circuit's decision in *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), because that case, unlike this one, involved a constitutional vagueness challenge. But the Sixth Circuit resolved the vagueness challenge by holding that "proceeds" means "what is produced by or derived from something (as a

sale, investment, levy, business) by way of *total revenue*." *Id.* at 1101 (emphasis added) (quoting *Webster's Third New International Dictionary* 1807 (1971)). That definition of proceeds squarely conflicts with the "net income" definition that the Seventh Circuit adopted here. Respondents' contention that "*Haun* did not squarely resolve whether the words [sic] 'proceeds' as used in the money laundering statute refers to net or gross income" (Br. in Opp. 17) is thus incorrect.

Respondents also fail to reconcile the decision below with the Third Circuit's decision in *United States* v. *Conley*, 37 F.3d 970 (1994). Respondents correctly note (Br. in Opp. 16) that *Conley* involved review of the pretrial dismissal on double jeopardy grounds of a charge of conspiracy to commit money laundering, while this case involves review of a money laundering conviction.[2] That difference in procedural posture, however, does not reconcile the result and reasoning in *Conley* with the outcome in this case. In resolving the double jeopardy challenge in *Conley*, the court viewed its task as defining "the essential elements" of money laundering (37 F.3d at 976)—which is what the court did here. And the court held in *Conley* that the defendants' use of receipts from gambling machines to pay the expenses of the illegal gambling operation constituted a prohibited transaction with "proceeds" (*id.* at 980)—which is precisely what the court rejected here.

Respondents seek support (Br. in Opp. 17) from the statement in *Conley* that "money, once collected from the poker machines, became 'proceeds of specified unlawful activity' within the meaning of the money

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[2] The government acknowledges that the petition incorrectly stated (at 17) that *Conley* involved a conviction, but that has no bearing on the legal analysis.

laundering statute." 37 F.3d at 980. Far from supporting respondents, however, that statement contradicts their position. The money laundering charges that the court of appeals dismissed in this case were all based on transactions involving money that had been collected from the gambling machines.

Respondents do not dispute (Br. in Opp. 17-18) the government's contention that "[t]he outcome here also cannot be squared with numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of receipts of illegal activity to compensate accomplices or to pay other costs incurred to conduct the activity." Pet. 18. Respondents instead note (Br. in Opp. 18) what the government has already acknowledged—that "the defendants in those cases did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds." See Pet. 19. The holdings of those cases nonetheless reflect the understanding—universally accepted until the decision here—that the money laundering statute prohibits the use of the revenue from criminal activity to pay for the overhead and expansion of that activity. Moreover, each of those cases would have been decided differently had the courts applied the definition of proceeds adopted by the Seventh Circuit in this case. This Court's intervention is warranted to bring the Seventh Circuit into line with the other courts of appeals.[3]

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[3] Respondents contend (Br. in Opp. 13-14) that the decision below is consistent with the Seventh Circuit's earlier decision in *United States* v. *Jackson*, 935 F.2d 832 (1991). But the decision below is *not* consistent with *Jackson*, in which the court held that "plowing back" revenues from unlawful activity does constitute money laundering, *id.* at 842, and applied that holding to the purchase of beepers to be used in drug activity, *id.* at 841.

3. The question presented is important.

Respondents incorrectly contend (Br. in Opp. 19) that the government has failed to show that "[t]he question presented is of recurring importance." Contrary to that contention, the factual scenario that raises the question presented is typical of money laundering prosecutions under the promotion subsection of the statute. As the multitude of cases cited in the petition demonstrates (see Pet. 13-14 n.2, 18-20), most of those prosecutions involve the use of revenue from criminal activity to pay the expenses of that activity or to fund its continuation or expansion. Those prosecutions are a critical part of the government's efforts to combat organized crime, illegal gambling, drug dealing, and fraud. Thus, even if the court of appeals' decision is read narrowly (see Br. in Opp. 12-13, 18), it constricts significantly the scope of the money laundering statute. And, if the decision is construed broadly, it will essentially eviscerate the promotion subsection of the statute. See Pet. 21.

However the decision is construed, it will impose unreasonable burdens on both the courts and the government. As explained above, courts will be required to establish accounting rules for illegal businesses, and, in order to prove a money laundering violation, the government will be required to establish that, under those accounting rules, the illegal businesses earned a profit. That task will be extremely burdensome because criminals rarely keep accurate accounting records. Respondents' reply to these concerns is that the government "has not cited any instance in which use of an accounting method has unduly stymied a money laundering prosecution." Br. in Opp. 14. That fact is not surprising, however, since no other court has yet

adopted the unworkable rule that the Seventh Circuit adopted here.[4]

Notably, respondents do not dispute that the burdens created by the Seventh Circuit's definition of proceeds will arise in *all* money laundering prosecutions, whether under the promotion or the concealment subsections of the statute. Thus, even when a transaction is explicitly designed to conceal or to disguise the illicit origins of funds, a defendant will evade conviction unless the government can demonstrate that the funds represent profits rather than gross receipts of criminal activity. Congress did not intend to impose that serious obstacle to effective enforcement of the money laundering statute, and this Court's intervention is necessary to prevent its imposition by the court of appeals.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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NOVEMBER 2002

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[4] Respondents also state that "[i]t does not take a Wharton's School of Business graduate to deduce that the charged money laundering transactions * * * were conducted with the gross receipts of gambling activity." Br. in Opp. 15. The government's point, however, is that it *would* take someone well versed in accounting principles, reviewing respondents' expense records, to ascertain whether those transactions were conducted with "net income" or "profits."